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IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,
PETITIONERS,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 16 NEWS MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici curiae, described in Appendix A, are The Reporters Committee for Freedom of the Press and sixteen news media organizations: Advance Publications, Inc., The American Society of News Editors, The Associated Press, Cable News Network, Inc., the E.W. Scripps Company, Gannett Co., Inc., the Hearst Corporation, Military Reporters and Editors, the National Press Club, NBC Universal, Inc., the New York Times Company, the Newspaper Association of America, the Newspaper Guild-CWA, the Radio-Television News Directors Association, the Society of Professional Journalists, and The Washington Post.

This case concerns an issue critical to the public's right to hold government actors accountable for their conduct: whether the government can engage in unprecedented expansion of an exemption to the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(F), to bar release of government information when the life or safety of "any individual" could reasonably be endangered — even when such potential harm is entirely speculative.

As the outlet from which most members of the public obtain facts about government conduct, the

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amici* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and that written consent of all parties to the filing of the brief *amici curiae* (aside from those who have given general consent to all *amici*) has been filed with the Clerk.

news media has a critical interest in obtaining information that helps citizens hold government officials accountable.

SUMMARY OF ARGUMENT

The issue in this case is the simple interpretation of Exemption 7(F) to the Freedom of Information Act ("FOIA"), which protects the safety of individuals linked to law enforcement investigations. The courts below have interpreted this exemption, consistent with other federal court decisions on the matter, to require a showing that an individual meant to be protected under the law must be identifiable with "reasonable specificity" and the release of information must be "reasonably expected to endanger" that individual. *American Civil Liberties Union v. Dep't of Defense* ("*ACLU II*"), 543 F.3d 59, 71 (2nd Cir. 2008).

In this case the ACLU and other civil rights groups sought access to photographs depicting alleged abuse of detainees held by U.S. troops in Iraq and Afghanistan. The Petitioners, the U.S. Department of Defense and other government agencies, argued the photos are not required to be released because of exemptions to FOIA, specifically Exemptions 6 and 7(C) governing privacy. In what even the Second Circuit noted was an "afterthought,"[2] Petitioners then raised Exemption 7(F) which protects against harm to individuals. The privacy exemptions were essentially rendered moot when Respondents agreed to redactions of identifying features which the district and appellate courts viewed as sufficient privacy

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[2] *ACLU II*, 543 F.3d at 66.

protection under those exemptions. Petitioners maintain that Exemption 7(F) justifies withholding the photos and asks this Court to broaden the interpretation of the exemption.

The government's continued plea for the expansion of Exemption 7(F) to cover large categories of individuals based upon mere speculation of endangerment is inconsistent with the law's history and would compromise FOIA's intent, which favors disclosure and narrow interpretation of any exemptions to disclosure. *EPA v. Mink*, 410 U.S. 73, 80 (1973) (FOIA is intended to emphasize the "fullest responsible disclosure") (internal quotation omitted); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (*quoting Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (stating the exemptions to FOIA must be "narrowly construed")). Exemption 7(F) does not permit the government to hide records from the public for fear of violent or retaliatory action against "any individual" without "reasonable" belief that action would occur. Here, the courts have properly found any retaliatory action to be "merely speculative" and disregarded any potential endangerment without a tie to an identifiable individual.

FOIA was enacted to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The law provides the public with the right to receive records and information from government in order to further democratic principles and allow for independent evaluation of government action. In turn, citizens can hold government actors accountable for

their actions through elections or other means. Shielding access to government information — no matter how unfavorable, embarrassing, or damning — to avoid accountability is fundamentally inconsistent with FOIA. The law does not exist to protect government actors when their misconduct reflects poorly upon government. The photos here, however "bad," are critical to the public debate over torture and the U.S. government's counterterrorism tactics. American citizens have the right to view them and evaluate for themselves whether subsequent action has resulted in appropriate accountability.

The law on release of these images is clear. To cloud that judgment with undue weight to speculative retaliation or violence to U.S. servicemen and women — a respected and admired category of individuals to all, including *amici* — would be to make bad law affecting all future Exemption 7(F) claims. The law on Exemption 7(F) is consistent, has properly been considered, and has been interpreted narrowly by the courts below. No split exists among the circuits or any lower courts as to its interpretation. The government's proposed reach of Exemption 7(F) is misdirected and would use the pretext of speculative harm to circumvent accountability.

This Court should deny Petitioner's request for review.

ARGUMENT

I. FOIA requires release of the photographs as the government has not demonstrated that disclosure would "reasonably be expected" to endanger "any individual."

FOIA was enacted to promote disclosure of government information.[3] However, Congress did not disregard the need for certain information to be withheld from the public, providing nine exemptions to the law.[4] FOIA's exemptions protect certain government records from release even when they fulfill the core purpose of the law: to encourage government disclosure of information to the public so citizens may know "what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-23 (1988) (internal quotation and emphasis omitted). However, "[c]onsistent with FOIA's purposes, these statutory exemptions are to be narrowly construed." *John Doe*, 493 U.S. at 152. The district and appellate courts here considered whether the government provided sufficient justification for narrow application of exemptions to FOIA precluding release of the photographs and determined it did not.

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[3] *See* S. Rep. No. 89-813, reprinted in Freedom of Information Act Source Book, 38 (Comm. Print 1974) ("It is the purpose of the present bill to . . . establish a general philosophy of full agency disclosure unless information is exempted. . . ."); *see also Mink*, 410 U.S. at 80, *supra* Sec. I.

[4] 5 U.S.C. § 552(b)(1)-(9).

Exemption 7(F) protects law enforcement records from release to the limited extent that disclosure "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). The appellate court has properly interpreted the "any individual" language within Exemption 7(F) to require actual identification of "individuals" rather than broadly "gesturing to the populations of two nations and two international expeditionary forces." *ACLU II*, 543 F.3d at 70. The "any individual" language has been an issue in few lower court cases. Even those that did not require identification by name stopped short, as the appellate court found, of taking the "leap of logic" required to conclude that the government need not identify any individual at all, or that it would be sufficient to identify individuals who are members of boundless populations. *See Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 1313, 1321 (D. Utah 2003) (interpreting "any individual" to protect specific, identifiable individuals —numerous, yet still identifiable — residing within certain areas of the maps at issue in the case); *see also Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94, 108 (D.D.C. 2002), *aff'd in part and rev'd in part*, 331 F.3d 918, 925 (D.C. Cir. 2003) (holding that withholding names and other detention information regarding persons held for questioning in respect to the September 11 terrorist attacks is allowed not under Exemption 7(F) but under Exemption 7(A)).

The government insists that unidentifiable classes of persons numbering in the thousands such as "United States military and civilian personnel in

Iraq and Afghanistan"[5] should be read as "any individual." It supports this argument with declarations of high-ranking military officials who also identified broad swaths of individuals potentially facing endangerment. *ACLU II*, 543 F.3d at 71; *see also* Declaration of Director Phillip J. McGuire (Jul. 20, 2005) JA 158a, 163a (stating the release "would pose a threat to the lives and safety of *third parties*"); Declaration of Chairman Richard B. Myers (Aug. 25, 2002) JA 136a, 156a (stating the photos "must be withheld in order to protect the lives of: *members of the United States Armed forces, forces operating in cooperation with the United states*, and *contractors operating with those forces*; *U.S. officials*; *Iraqi and Afghan police and military personnel* working in coordination with our government and military forces; as well to protect against the increased likelihood of violence against *U.S. interests, personnel, and citizens world-wide.*") (emphasis added).

Here the government repeatedly failed to clearly identify "any individual" or even numerous individuals as part of a readily identifiable group who might be endangered by the release of the photographs but instead continues to assert that Exemption 7(F) should be expanded to nearly all persons everywhere at once, extending its reaches to hide records of its own misconduct behind assertions of harm to national security.[6] Rather than broaden the exemption

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[5] Petition for *Certiorari* at (I).

[6] In rejecting the expansion of Exemption 7(F) as encompassing any information that may be harmful to national security, the appellate court pointed to Exemption 1, which already to exists to protect release of information that may harm national secu-

to include any number of categories of individuals, as the government sought, the court properly, and narrowly, applied the exemption and found the government failed to meet that interpretation.

If the phrase "any individual" were to be interpreted without clear construction, covering limitless categories of individuals, it could do just as the government argues it should: protect any unforeseen person in any potential future setting from speculative harm that could be linked to release of law enforcement information. This goes squarely against the congressional intent limiting the scope of Exemption 7(F).[7] Moreover, practically speaking, this interpretation of Exemption 7(F) would swallow the rule.

The government in this case introduces an unprecedented interpretation of Exemption 7(F) that

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rity, as a "powerful reason not to construe exemption 7(F) as broadly as the defendants urge." *ACLU II*, 543 F.3d at 72. The court said the Petitioners' suggested use of Exemption 7(F) could be seen as a way to "evade[ ] the strictures and safeguards of classification" to "find shelter" in Exemption 7(F).

[7] While the 1986 amendment concerning Exemption 7(F) did expand the protection from only "law enforcement personnel" to cover "any individual," the legislative history states it was merely "slightly" modified. 131 Cong. Rec. p. S248 (daily ed. Jan. 3, 1985) (statement of Carol E. Dinkins, Deputy Attorney General); *see also* 132 Cong. Rec. p. H9462 (daily ed. Oct. 8, 1986) (statement of Rep. Glenn English) (the 1986 amendments make "only modest changes to the FOIA" and are only a "slight" expansion of Exemption 7(F)). The modification still required clear identification of "any individual."

would allow for its actions — here, its own misconduct and misconduct of its agents — to be covered by what amounts to blanket "classification" as the appellate court noted. *ACLU II*, 543 F.3d at 83. As the appellate court also pointed out, "it is unlikely to be the last" time the government would use such an argument to justify withholding information the public has a clear right to see under the law of this exemption. Exemption 7(F) was not enacted to protect government actors by cloaking their action when it is so atrocious that it provokes speculative fears of violent retribution.

The appeals court stated the standard for justifying withholding under Exemption 7(F) requires that the government identify "at least one individual with reasonable specificity" and establish that "disclosure of the documents could reasonably be expected to endanger that individual." *ACLU II*, 543 F.3d at 71. There is no question that "third parties" and the millions of individuals who could potentially be impacted by such release throughout the "U.S. Armed forces" and "worldwide" would not meet the specificity standard for "any individual" established by the appellate court and supported by every other court's interpretation of Exemption 7(F) as well as congressional intent.

II. The images at issue depict government conduct and promote accountability in furtherance of FOIA principles.

FOIA was enacted to break down the wall of government secrecy and promote accountability. This Court has held that FOIA makes "crystal clear the congressional objective, to pierce the veil of adminis-

trative secrecy and to open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 361 (internal quotes omitted). The law enables citizens to act as watchdogs; this Court noted that FOIA "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973). Further, FOIA is crucial in promoting an informed citizenry — a virtue vital to a functioning democracy and to preventing government corruption. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

FOIA is the mechanism that provides the American people with accurate information about their government. To truly hold the government accountable for its actions, citizens must be allowed to evaluate the "best evidence" of what occurred, in the words of the district court. *American Civil Liberties Union v. Dep't of Defense* ("*ACLU I*"), 389 F. Supp. 2d 547, 578 (S.D.N.Y. 2005). The photographs at issue here provide concrete, first-hand evidence of alleged torture that occurred at the hands of U.S. troops in Iraq and Afghanistan. They are part of the historical record of those wars and must be made available to the public.

Images convey matters of importance in a unique way. Visual images are more searing than words. They tell an entire story instantly and can be so powerful as to call people to action. Just as the government speculates the photos in this case will call for instant anti-U.S. retaliation, relying on evidence

that actually undermines its claim,[8] so too could they call for American citizens to act just as FOIA intends — by requiring accountability for the action depicted in the photographs' contents. FOIA was not enacted to protect against retaliation for potentially illegal, immoral, or simply embarrassing action taken by government; it exists to shed light on that action and allow citizens to evaluate whether subsequent action was appropriate and whether actors were held accountable, and to provide a yardstick with which to measure improvement in such action in the future.

Accurate information is one of the best tools to evaluate any series of decisions or actions. When provided with truthful information about government, citizens can best evaluate the choices their leaders have made and hold them accountable. The news media is often the link between accessing important government information such as this and providing it to the public — the "fourth estate" is the surrogate for the public in cases such as this. *Richmond Newspapers, Inc. v. Virginia*, 48 U.S. 555, 573

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[8] The frequency of violent incidents in Iraq in 2004 was actually higher in the first weeks of April than in the 14 weeks after the Abu Ghraib scandal broke April 28 when photos were aired on "60 Minutes II" and were later posted online by *The New Yorker* magazine. "Measuring Stability and Security in Iraq," Department of Defense Report to Congress (Dec. 2008). Additionally, U.S. troop deaths from enemy fire were also much higher before the photos appeared in public: 126 in April 2004 compared with 63 in May and 37 in June 2004. Department of Defense Personnel and Procurement Statistics, U.S. Military Casualty Information — Operation Iraqi Freedom (Aug. 1, 2009) *available at*: http://siadapp.dmdc.osd.mil/personnel/CASUALTY/castop.htm.

(1980). Releasing these images to the public so they can see for themselves the actions taken by the government on their behalf and determine what, if any, accountability may be warranted is the right thing to do — both considering FOIA policy and the interpretation of the law.

CONCLUSION

Exemption 7(F) properly protects from release law enforcement information that can "reasonably be expected" to endanger "any individual." The government has failed to link any identifiable individual with the harm it alleges would occur upon release of the photographs in this case.

The release of the photographs is required under Exemption 7(F). More than that, their release will inform and educate the public, and spark debate about the causes and forces that led to the breakdown of command discipline at Abu Ghraib prison and other American-run facilities. Providing citizens with information on government action is the very purpose that FOIA is intended to advance.

Amici share the Government's concern over the safety of American citizens and troops; however, the government's misdirected effort to undermine FOIA by expanding the reach of Exemption 7(F) far beyond Congressional intent and court interpretation so as to hide its own misconduct from the public and preclude accountability to those it governs is fundamentally counter to the principles of FOIA and democracy and has properly been rejected below.

Respectfully submitted,

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APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment and Freedom of Information Act litigation since 1970.

Advance Publications, Inc., directly and through its subsidiaries, publishes over 25 magazines with nationwide circulation, daily newspapers in over 20 cities, and weekly business journals in over 40 cities throughout the United States. These include The New Yorker, Vanity Fair, and Wired. It also owns many internet sites and has interests in cable systems serving over 2.3 million subscribers.

With some 600 members, ASNE is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and credibility of newspapers.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's embers include approximately 1,500 daily newspapers and

5,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and maintains bureaus in 240 cities worldwide. AP news reports in print and electronic formats of every kind reach a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 121 countries.

Cable News Network, Inc. ("CNN"), a division of Turner Broadcasting System, Inc., a Time Warner Company, is the most trusted source for news and information. Its reach extends to nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; CNN Digital Network, the No. 1 network of news Web sites in the United States; CNN Newsource, the world's most extensively syndicated news service; and strategic international partnerships within both television and the digital media.

The E.W. Scripps Company is a diverse media enterprise with 18 daily newspapers and numerous weekly publications reaching approximately 1 million readers, nine broadcast television stations, five national cable networks that reach more than 90 million households, an electronic commerce and interactive media division and licensing and syndication division.

Gannett Co., Inc. is an international news and information company that publishes 84 daily newspapers, including USA TODAY, and nearly 850 non-daily publications across the US. The company also operates 23 TV stations and over a 100 websites that

are integrated with its publishing and broadcasting operations.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines, and business publications. Hearst's major interests also include ownership of 29 broadcast stations which reach a combined 18 percent of U.S. viewers; interests in several cable television networks; Internet businesses; and a leading newspaper features syndicate.

Military Reporters & Editors, Inc. is a not-for-profit corporation consisting of more than 150 journalists, journalism educators, and others from around the country involved in reporting on military, national security and homeland defense issue. Military Reporters & Editors Inc. exists to advance public understanding of the military, national security and homeland defense; to educate and share information with its members and the public on best practices, tools and techniques for such coverage; to represent the interest of working journalists to the government and military; and to assure that journalists have access to places where the U.S. military and its allies operate. Its members heavily rely on public records and proceedings to inform themselves and the public about these issues.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,500 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events including news conferences, luncheons, and panels, and more than 250,000 guests come through its doors.

NBC Universal, Inc., is one of the world's leading media companies. NBC Universal owns and operates the NBC television network, the Spanish-language network Telemundo, NBC News, television stations, and several news and entertainment networks, including MSNBC and CNBC. NBC News produces programs including the Today show, NBC Nightly News with Brian Williams, Dateline, and Meet the Press.

The New York Times Company is the publisher of The New York Times, the International Herald Tribune, The Boston Globe, and 15 other daily newspapers. It also owns and operates WQXR-FM and more than 50 websites, including nytimes.com, Boston.com and About.com. The New York Times maintains a bureau in Baghdad and, like the Company's other newspapers and broadcast stations, has actively covered the wars in Iraq and Afghanistan.

The Newspaper Association of America is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. Its members account for nearly 90 percent of the daily newspaper circulation in the United Sates and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Newspaper Guild - CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild

is a sector of the Communications Workers of America. As America's largest communications and media union, representing over 700,000 men and women in both private and public sectors, CWA issues no stock and has no parent corporations.

The Radio-Television News Directors Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTNDA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTNDA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The Washington Post is a leading newspaper with a nationwide daily circulation of over 647,000 and a Sunday circulation of over 878,000.

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